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No. 02-258

In the Supreme Court of the United States

SUSAN JINKS, PETITIONER

v.

RICHLAND COUNTY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE UNITED STATES

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Respondent cannot seriously dispute the South Carolina Supreme Court's conclusion (Pet. App. 7a) that 28 U.S.C. 1367(d) is "necessary" legislation within the meaning of the Necessary and Proper Clause of the Constitution. Instead, respondent and its amici argue that Section 1367(d) is not "proper" legislation, because sovereign immunity precludes Congress from tolling the limitations period for state-law claims against municipal and county defendants while such claims are pending in federal court, and because Congress lacks constitutional authority to pre-empt state limitations periods for state causes of action generally. Neither theory has merit.

I. Unlike the States, Counties And Municipalities Have No Constitutional Immunity

Respondent's claim that sovereign immunity precludes Section 1367(d) from being applied to county and municipal defendants rests on a fundamental misapprehension about our federal system. This Court has repeatedly held that *States* occupy a special role as "residuary sovereigns" and "joint participants in" the dual system of government established by the Constitution. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Because of that special status, Congress may not subject non-consenting States to private lawsuits—it cannot abrogate their sovereign immunity—in federal court or in

the State's own courts except as authorized by Section 5 of the Fourteenth Amendment. *Id.* at 728-729, 756. That limit, moreover, applies to suits against an "arm or *alter ego* of the State." *State Highway Comm'n* v. *Utah Constr. Co.*, 278 U.S. 194, 199 (1929).

Respondent, however, is not—and does not claim to be—a "State" or an "arm of a State." Respondent is a county. Unlike States, municipalities and counties are not coordinate "sovereigns" in our federal system. See U.S. Br. 32-34. To the contrary, an "important limit to" the constitutional "principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756. This Court rejected the claim that counties enjoy constitutional sovereign immunity over a century ago in *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890). Noting that the Court's records "for the last thirty years are full of suits against counties," the Court declared that counties, while "territorially a part of the State," are "corporation[s]" that may form "part of the State *only in that remote sense* in which any city, town, or other municipal corporation may be said to be a part of the state." *Ibid.* (emphasis added). The "powers of a municipal character which have been or may be lodged in the city corporations * * * do not make those bodies sovereign." *Metropolitan R.R.* v. *District of Columbia*, 132 U.S. 1, 9 (1889). See *Alden*, 527 U.S. at 715 (contrasting States with "mere * * * political corporations").[1]

[1] Respondent's unsupported assertion (Br. 15) that "[p]rinciples of sovereign immunity" have long "protected not just the arms of the State" but also "all forms of government including lesser governmental entities" is thus unpersuasive, especially as a matter of federal law. Municipalities were "routinely sued in both federal and state courts" by 1871, and it was by then "a general rule" that "a municipality's tort liability in damages was identical to that of private corporations and individuals." *Owen* v. *City of Independence*, 445 U.S. 622, 639-640 (1980). Respondent offers no persuasive reason for overturning more than a century of this Court's precedents. It may be true that, in some instances, state common law or statutes accorded municipalities and other lesser entities a defense to liability under the rubric of "immunity," but that is not relevant to the scope of *Congress's* constitutional powers. See pp. 6-7, *infra*. Respondent thus misunderstands (and inadvertently misquotes) the United States' position in claiming that the "United States acknowledges that '[w]hether and to what extent respondent and other local governmental bodies enjoy 'sovereign immunity' *is* a matter of *state* law is for South Carolina officials to decide." Resp. Br. 15 n.4 (some emphasis added). The United States' position is that "[w]hether and to what extent respondent and other local governmental bodies enjoy 'sovereign immunity' *as* a matter of *state* law is for South Carolina officials to decide." U.S. Br. 32 (some emphasis added). "[C]ounties and municipalities," however, "have no immunity as a matter of *federal* law from such private suits as Congress chooses to authorize," *ibid.*, and they lack any "distinct *federal* status that would render" Section 1367(d) "invalid as applied to them," *id.* at 34 (emphasis in original).

For that reason, the South Carolina Supreme Court erred in assuming without discussion that suits against respondent are, for federal constitutional purposes, equivalent to suits against the State itself. See Pet. App. 8a ("As a matter of sovereignty, the *State* has the authority to determine whether" and "the conditions under which *it* consents to suit") (emphases added and omitted). Even if South Carolina affords both the State itself and "lesser entities" such as counties and municipalities a special immunity from suit as a matter of state law, federal constitutional immunity extends only to the State and arms of the State. Accordingly, respondent does not advance its argument by invoking the decisions of this Court recognizing the special status of States in our system of government. Those decisions—even as quoted by respondent—address Congress's power to authorize suit against the States and arms of the States. See, *e.g.*, *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 534 (2002) (quoted Resp. Br. 9, 12) ("suits against *a state sovereign*" and "claims against *state defendants*") (emphases added); *Alden*, 527 U.S. at 749 (quoted Resp. Br. 9) ("the immunity *of a sovereign*") (emphasis added).[2]

[2] Indeed, while the majority opinion in *Alden* refers to States and state sovereigns over 300 times, it mentions political subdivisions such as

Nor does it matter that respondent characterizes itself as a "political subdivision" of the State. See *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 43 (1994) ("the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power") (quotation marks and citation omitted). Respondent can claim the benefit of the State's constitutional status only if respondent can show that it is *the State* or is an *"arm" of the State*—an argument that respondent does not attempt to make. See *Moor* v. *County of Alameda*, 411 U.S. 693, 717, 721 (1973) (California county, which could exercise corporate powers, hold property in its own name, sue, be liable for judgments, and levy taxes, is not an "arm of the State"); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (contrasting "county or city" with "an arm of the State"); *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 430 (199., (whether the judgment "would be enforceable against the State" itself "is of considerable importance" in determining whether entity is an "arm of the State"); *Hess*, 513 U.S. at 48-49, 50 (no immunity where liability does not implicate "the States' solvency and dignity").[3]

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counties and municipalities twice—both times to *distinguish* them from the State itself, emphasizing that they cannot claim the State's sovereign immunity. See 527 U.S. at 756 (sovereign immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *id.* at 715 (States "are not relegated to the role of mere provinces or political corporations.").

[3] For similar reasons, the observation of the State amici (Br. 20) that cities and counties "derive their existence" from and "can exercise only those powers conferred upon" them by the States is irrelevant. The same is true of *private* corporations created by state law. Amici's reliance on this Court's observation that States may delegate political power to "political subdivisions" such as counties and municipalities—an observation made in an entirely different context—is likewise misplaced. See State Amici Br. 20-21 (quoting *City of Columbus* v. *Ours Garage & Wrecker Serv. Inc.*, 122 S. Ct. 2226, 2232 (2002)). The States also delegate political power to individuals, who enjoy no constitutional immunity where the suit is not, in substance, a damages action against the State. Under this

Respondent nonetheless asserts that "the scope and extent of federal constitutional immunity is not obviously limited to Eleventh Amendment immunity." Resp. Br. 14; see *id.* at 15 ("absence of Eleventh Amendment immunity * * * not dispositive"). But while the federal constitutional immunity from suit this Court has recognized is not limited to the precise terms of the Eleventh Amendment, it is limited to States and arms of the State. *Alden*, 527 U.S. at 713. The federal immunity "derives * * * from the structure of the original Constitution itself," *id.* at 728, and is "demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design," *id.* at 729. That constitutional design designates the States and the federal government as sovereigns and accords them a sovereign's immunity to suit, but it does not do the same for municipal corporations and counties. See *id.* at 756 (immunity "does not extend to * * * a municipal corporation or other governmental entity which is not an arm of the State"). The "Founders established 'two orders of government,'" *id.* at 751—not three or more, as respondent and its amici propose.

For similar reasons, respondent errs in arguing (Br. 32; see State Amici Br. 26-30) that Section 1367(d) should be read as inapplicable to lawsuits against county and municipal defendants. Precisely because local governments do not enjoy the same sovereign status as the States, this Court has not required a clear statement from Congress before local governments may be subjected to suit. Compare *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989) (State not a "person" for purposes of 42 U.S.C. 1983), with *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 683-689 (1978) (city is a "person" for purposes of Section 1983). Respondent's and its amici's reliance on *Raygor*,

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Court's cases, a state-created entity may claim the State's sovereign immunity as its own only if that entity is "an arm of the State," a test respondent and its amici make no effort to meet.

supra, (*e.g.*, State Amici Br. 28) is therefore misplaced. *Raygor* requires a clear statement before the Court will conclude that Congress has attempted to adjust the extent to which a "state sovereign" is "amenable to suit in its own courts." 534 U.S. at 544. It does not require a clear statement before Congress addresses the extent of municipal liability.[4] Further, in *Raygor*, the Court found reason to doubt whether Section 1367(a), (b), and (c), should be read to encompass a lawsuit against a State in federal court; the Court therefore found corresponding reason to doubt whether Section 1367(d) was meant to apply to suits against state sovereigns. See 534 U.S. at 545-547. Here, no one disputes that Section 1367(a), (b), and (c) apply in lawsuits against counties and municipalities. There is no basis for giving Section 1367(d) a radically different scope.

Unable to identify a constitutional or federal statutory basis for according counties immunity from otherwise valid federal legislation, respondent and its amici declare that Congress can neither "abrogate sovereign immunity *as derived under state law*," Resp. Br. 16 (emphasis added), nor intrude on the "State's authority to set the conditions on which to waive * * * the [state-law] immunity of its political subdivisions under State law," State Amici Br. 19. The States, of course, have inherent sovereign authority to enact laws that identify when municipalities will be subject to suit, the causes of action that can be maintained, and any defenses, including limitations periods. But States have that sovereign law-making authority with respect to wholly private defendants too. "[A]ll legislative powers appertain to sovereignty." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819); *McElmoyle* v. *Cohen*, 38 U.S. (13 Pet.) 312, 326 (1839) (States may set "the time after which suits or

[4] The clear statement rule the Court applied in *Raygor* also had the virtue of avoiding a potential constitutional issue, namely Congress's authority to interfere with the scope of a State's waiver of its federal constitutional immunity. Here, there is simply no weighty federal constitutional issue to be avoided.

actions shall be barred * * * in virtue of that sovereignty by which it exercises its legislation *for all persons and property*.") (emphasis added). If the State exercises that authority by establishing laws that conflict with a valid federal policy or enactment, however, they—like any other state laws—may be pre-empted. See, *e.g.*, *Pierce County* v. *Guillen*, 123 S. Ct. 720, 731-732 (2003) (upholding, under the Commerce Clause, a federal evidentiary privilege that supersedes state evidence and discovery rules in cases arising under state law). Indeed, if South Carolina purported to lift the state-law immunity to suit in all cases against cities and counties except those brought by federal employees, or by individuals who had asserted rights under a federal statute, Congress would have unquestioned power to pre-empt those limits as inconsistent with federal policy. The fact that a State chooses to attach the label "sovereign immunity" to such a state-law limit on municipal or county liability does not entitle that limit to special status under federal law. To the contrary, whether a particular defendant is the State or an arm of the State entitled to constitutional immunity is a question of federal, not state, law. See U.S. Br. 32 n.8; *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 530 n.5 (1997). Unlike the federal constitutional immunity of States and arms of the States, state-law limits on suits may be pre-empted (not abrogated) by a federal statute, like Section 1367(d), through normal operation of the Supremacy Clause.

II. Congress May Toll Or Pre-empt State Limitations Periods That Are Inconsistent With Valid Federal Enactments And Policies

A. Respondent and its amici also assert that Section 1367(d) is unconstitutional in all its applications because Congress lacks authority to toll limitations periods for state causes of action, regardless of the defendant's identity. See Resp. Br. 17-22; State Amici Br. 8-19. The South Carolina Supreme Court, however, did not adopt that argument, and this Court foreclosed it more than a century ago in *Stewart*

v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870). In *Stewart*, the Court upheld a federal statute that tolled state limitations periods in civil and criminal cases during the Civil War. Here, respondent argues that, because state courts "are distinctly separate from federal courts," Congress "clearly lacks authority to * * * establish rules of practice and procedure therein." Resp. Br. 18-19. But the defendant in *Stewart* raised precisely the same argument: Because "the State courts are considered as courts of another sovereignty," he argued, Congress "cannot prescribe rules of proceeding for such State courts." 78 U.S. (11 Wall.) at 498 (footnote omitted) (argument of counsel). *Stewart* rejected that contention, upholding the tolling provision as "necessary and proper" to the effectuation of Congress's express powers under the Constitution. *Id.* at 506. As explained in our opening brief (at 21-25), and below (pp. 9-11, *infra*), Section 1367(d) is likewise "necessary and proper" to the effectuation of Congress's express constitutional powers here.

Attempting to distinguish *Stewart*, respondent and its amici note that the statute there was "necessary and proper" to Congress's exercise of its Article I "war powers." Resp. Br. 26; State Amici Br. 10; Council of State Gov'ts Br. 20-21. But respondent and its amici fail to offer a persuasive reason why Congress's reliance on the war power of Article I, Section 8, Clause 11, rather than its other powers, meaningfully distinguishes *Stewart*. The text of the Necessary and Proper Clause accords Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," *i.e.*, *all* of the previously listed Article I, Section 8 powers, "*and all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18 (emphasis added). Consistent with constitutional text, Congress's power to enact "necessary and proper" legislation is not remotely limited to its war powers, see, *e.g.*, *Ex parte Curtis*, 106 U.S. 371, 372 (1882); *The Legal Tender Cases*, 110 U.S. 421, 449-450 (1884); *United States* v. *Classic*, 313 U.S. 299, 320 (1941), and respondent offers no persuasive reason for denying Congress the authority it exercised in *Stewart*.[5]

Here, Section 1367(d) is "necessary and proper" to Congress's establishment of the lower federal courts and ensuring their efficacy under Article I, Section 8, Clause 9, and Article III, Section 1. See U.S. Br. 22-23. It is one of a number of provisions that permit the Article III courts to function by providing clear and friction-minimizing rules for the interaction of state and federal courts. See, *e.g.*, 28 U.S.C. 1446 (providing for removal of cases to federal court, stay of state proceedings, and remand of removed cases); *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988); 11 U.S.C. 108(c) (tolling state limitations periods for term of bankruptcy automatic stay, plus 30 days). Further, where the state-law claims are initially filed in federal court in connection with a federal cause of action—in this case, an action to enforce civil rights under 42 U.S.C. 1983—the tolling provision is necessary and proper to the execution of the constitutional grant of authority on which the federal cause of action is based. See U.S. Br. 26 n.7. Unless limitations periods are tolled while state-law claims are pending in federal court, plaintiffs with state and federal claims may be chilled from exercising their statutory right—a right granted here by 42 U.S.C. 1983, 28 U.S.C. 1331, and 28 U.S.C. 1367(a)—to assert those claims in federal court. U.S. Br. 22-23. That is true because, absent the protection provided by Section 1367(d), the selection of a federal forum would risk dismissal of the pendent state claims under the standards articulated in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and 28 U.S.C. 1367(c), after the state limitations period, and thus the ability to assert those claims in state court, had expired.

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[5] Respondent's other distinction is that, unlike the defendant in *Stewart*, it is a county or municipality. That argument fails because municipalities and counties have no special federal constitutional status. See pp. 1-7, *supra*.

Because of similar risks, this Court has recognized that, absent the equivalent of tolling through the "remand" of removed cases to state court, plaintiffs might be chilled from bringing federal claims that would render their cases removable. See *Cohill*, 484 U.S. at 352 n.9. For the same reasons, the absence of a tolling provision for state-law claims asserted as part of a single case or controversy in federal court might chill plaintiffs from exercising their statutory right to a federal forum. See U.S. Br. 22, 24. As the American Law Institute Study observed:

> It is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous.

Study of the Division of Jurisdiction Between State and Federal Courts 453-454 (1969) (ALI Study). Congress has authority to address not only the conduct of cases or controversies in federal court, but also the consequences of the pendency of such actions. Cf. 11 U.S.C. 108(c) (extending state limitations periods while bankruptcy automatic stay is in effect plus 30 days).

Section 1367(d) is also necessary and proper to Congress's creation of the lower federal courts and its regulation of their jurisdiction and modes of procedure. See U.S. Br. 20-25. Respondent nowhere disputes that Congress has constitutional authority to enact 28 U.S.C. 1367(a), which affords the federal courts supplemental jurisdiction over pendent state-law claims, and to apply that provision to all non-state defendants. That provision promotes "judicial economy" by permitting federal courts to resolve all of the federal- and state-law claims that make up a single "case or controversy" within the federal judicial power. See U.S. Br. 18-19; *Gibbs*, 383 U.S. at 725. Nor does respondent deny that Congress acted constitutionally in enacting 28 U.S.C. 1367(c), which

permits a federal district court to decline jurisdiction over state claims if, among other things, it has dismissed the federal claims. Section 1367(c) strikes a balance between the efficient resolution of related state and federal claims, and the need to avoid unnecessary federal resolution of state-law issues. U.S. Br. 20-21. The "justification" for that balance "lies in considerations of judicial economy," "convenience," and "comity," as well as the "promot[ion] [of] justice between the parties" that can be secured by "procuring" the state court's "surer-footed reading of applicable law" where appropriate. *Gibbs*, 383 U.S. at 726.

Section 1367(d) is an integral part of the balance established by Section 1367(a) and (c). Section 1367(d) both removes any artificial disincentive to exercising the congressionally created right to a federal forum in the first instance, see pp. 9-10, *supra*; U.S. Br. 22-23, and eliminates the distorting effect that untolled limitations periods may have on the exercise of judicial authority to retain or dismiss pendent state-law causes of action following dismissal of federal claims. Indeed, before Section 1367(d)'s enactment, district courts' exercise of discretion to retain or dismiss such claims was often skewed by limitations issues. See U.S. Br. 5-6 & nn. 1-2; Pet. Br. 13-16. For precisely those reasons, the South Carolina Supreme Court concluded that "Section 1367(d) is a useful aid to the exercise of federal jurisdiction, and, therefore, is 'necessary' within the meaning of the Necessary and Proper Clause." Pet. App. 7a (internal quotation marks omitted). Section 1367(d), that court explained, "allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis" proves insufficient, and "eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court." *Ibid.*

B. Because Section 1367(d) is necessary and proper legislation, respondent errs in relying on cases like *McElmoyle*, 38 U.S. (13 Pet.) at 327; *Mondou* v. *New York, New Haven, & Hartford R.R.*, 223 U.S. 1 (1912), and *Felder* v. *Casey*, 487

U.S. 131 (1988). Resp. Br. 18-19; see also Council of State Gov'ts Br. 11-13. Those cases recognize that the States have sovereign authority in the first instance to establish statutes of limitations and rules of procedure applicable to state-law cases in state courts. They do not resolve Congress's authority to supersede such laws to protect and effectuate federal interests. To the contrary, except for *Felder*, none of those cases involved federal statutes that might be thought to pre-empt state law. And in *Felder*, this Court held that, because the State's procedural requirements were inconsistent with the federal cause of action, they were pre-empted. 487 U.S. at 141-146. Thus, far from supporting petitioner's arguments, *Felder* undermines them. See also *Howlett* v. *Rose*, 496 U.S. 356, 377-378 (1990) (state-law immunity from suit pre-empted to the extent it extended "not only to the State and its arms but to municipalities, counties, and school districts that might otherwise be subject to suit" under the federal statute). Nor is respondent correct that a federal cause of action is a prerequisite to federal pre-emption of state rules that are inconsistent with federal law. See, *e.g.*, *Pierce County*, *supra*.

Respondent (Br. 20-21) and its amici (State Amici Br. 13; Council of State Gov'ts Br. 12-13) likewise err in asserting that diversity cases such as *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), provide support for respondent's argument that Section 1367(d) is unconstitutional. Those cases address the law that *federal courts* must apply to state claims *in the absence* of an otherwise valid federal statute governing the issue. They do not purport to address the power of Congress to supersede state laws in pursuit of legitimate federal policies.[6] "The *Erie* rule" thus "has never

[6] Respondent's and its amici's *Erie*-based arguments, moreover, appear to rest on a syllogism with a doubly false premise. They argue that Congress is without authority to order *federal courts* to apply federal rather than state law to resolve specific issues in claims arising under state law; it follows naturally, they appear to assume, that Congress cannot require state courts to do likewise. The premise of their argument, however, is false both generally and in this specific context. It is generally false because Congress has authority to pre-empt state laws—including limitations periods—that are inconsistent with otherwise valid federal interests. It is false here because Congress can pursue legitimate federal policies by directing federal courts to apply a federal limitations period, rather than a state limitations period, to claims arising under state law. Cf. *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722, 726 (1988) (holding that forum State may apply its own limitations period "to claims that in their substance are and must be governed by the law of a different State" consistent with the Full Faith and Credit Clause). The State amici's reliance (Br. 9) on *Sun Oil* is misplaced. Although *Sun Oil* allows a forum State to apply its own statute of limitations to causes of action created by other States, it does not address whether a forum State may choose to apply its own limitations period where the laws of the United States—the Supreme law of the land—pre-empt that limitations period; nor does it address the scope of Congress's pre-emptive authority. For the same reason, it makes no difference that some States do not have a "savings" or "renewal statute" that tolls "the State's statutes of limitations" for "claim[s] brought in another sovereign's courts." Council of State Gov'ts Br. 5. In those areas in which Congress may constitutionally legislate, the United States is not merely "another sovereign"; it is the *supreme* sovereign, with authority to displace contrary state laws.

been invoked to void a Federal Rule," let alone a federal statute like Section 1367(d). *Hanna* v. *Plumer*, 380 U.S. 460, 470 (1965). See *Erie*, 304 U.S. at 79 (interference with "the legislative or the judicial action of the States is in no case permissible *except* as to matters by the Constitution specifically authorized or delegated to the United States.") (emphasis added). The scope of Congress's power is controlled by cases such as *Stewart*, *supra*, and *Pierce County*, *supra*, which uphold Congress's displacement of state limitations periods and evidentiary rules where necessary and proper to the exercise of valid federal powers.

C. Respondent also argues that the Tenth Amendment supplies counties and municipalities with the immunity from suit that the Eleventh Amendment, the "fundamental postulates" of our dual system of government, and cases like *Alden*, all withhold. The Tenth Amendment, however, does not

augment the immunity from suit conferred by the Eleventh Amendment and *Alden*, and so does not add anything to respondent's argument. As this Court has explained, the Tenth Amendment is in most of its applictions "essentially a tautology":

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. *United States*, 505 U.S. 144, 156 (1992). Here, Congress acted within the scope of its delegated powers in superseding state limitations periods that are inconsistent with legitimate federal policies. See pp. 9-11, *supra*. Section 1367(d) intrudes on state sovereignty no more than any other pre-emptive Act of Congress.

Nor is the Tenth Amendment anti-commandeering principle of *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, *supra*, applicable here. That principle bars Congress from "command[ing] state and local law enforcement officers" to "participate * * * in the administration of a federally enacted regulatory scheme"—*i.e.*, from "press[ing]" them "into federal service" in their official capacities. 521 U.S. at 902, 904, 905; see Resp. Br. 16; State Amici Br. 23. But Section 1367(d) does not command county or municipal officials to do anything, much less "command" them to administer a federal scheme. Instead, Section 1367(d) addresses the availability of a statute of limitations defense where the case or controversy was originally filed in federal court.

To the extent respondent or its amici suggest that Section 1367(d) violates the anti-commandeering rule because it compels *state courts* to adjudicate claims they would otherwise dismiss, see State Amici Br. 17-18 & n.7, they are mistaken. State courts exercising the judicial power must apply governing federal law to the cases before them. Far from violating the anti-commandeering principle implicit in the Tenth Amendment, the application of federal law in state courts is expressly mandated by the Supremacy Clause. "[T]he Laws of the United States shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*" U.S. Const. Art. VI, Cl. 2 (emphasis added). As this Court recognized in *New York* v. *United States*, federal "statutes enforceable in state courts do, in a sense, direct state judges to enforce them, *but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.* No comparable constitutional provision authorizes Congress to command state legislatures to legislate." 505 U.S. at 178-179 (emphasis added). Indeed, Congress's early enactments strongly suggest "that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907.

Section 1367(d) is consistent with that text and history. It does not require state courts to undertake resolution of a controversy that is beyond the judicial power. It merely provides that, in adjudicating limitations defenses for controversies originally filed but dismissed from federal court, state courts apply a federal tolling rule. No one disputes that Congress has the power to pre-empt state-law claims entirely, or to provide a federal defense to such claims. State Amici Br. 17. There is no logical reason why Congress cannot likewise pre-empt a state-law defense that is inconsistent with federal policy. That is especially true where, as here, the state law has the effect of disadvantaging plaintiffs for selecting a federal rather than a state forum. See pp. 17-19, *infra*. The State amici thus correctly concede (Br. 16) that, if Congress validly enacted Section 1367(d) "pursuant to one of its enumerated powers * * *, the Supremacy Clause would make that provision binding upon the States, even if it displaced the States' policy choices."

In any event, whatever the outer boundaries of Congress's power to require state courts to adjudicate claims in a manner that does not offend federal policy, they are not implicated here. This Court has repeatedly upheld Congress's power to require state courts to adjudicate claims over which they would prefer to decline jurisdiction. See U.S. Br. 28; *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 389-394 (1947). As the Court observed in *Alden*, the text of Article III gives "strong support to the inference that state courts *may be opened* to suits falling within the federal judicial power." 527 U.S. at 753.[7] This, moreover, is not a case in which Congress has required state courts to adjudicate claims on a subject matter they ordinarily would not address. The State of South Carolina has chosen, by its own enactments, to vest its courts with jurisdiction to hear tort claims like those at issue here against county defendants. Section 1367(d) merely requires that, in adjudicating those claims, state courts not apply a particular statute of limitations rule—a refusal to toll

[7] The defect in *Alden* was that the lawsuit—because it was against the State itself—was barred by sovereign immunity and outside the judicial power: "We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts." 527 U.S. at 754. Here, the controversy was within the judicial power and within the authority of federal courts to hear. The State amici also err (Br. 18 n.7) in relying on a partial quotation from *Alden*, because the quoted material (in context and in full) contradicts their position. *Alden* first recognized that Congress "may require state courts of 'adequate and appropriate' jurisdiction, * * * 'to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power.'" 527 U.S. at 752 (citation omitted). It then added: "It would be an unprecedented step, however, to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress's authority to pursue federal objectives through the state judiciaries exceeds *not only* its power to press other branches of the State into its service *but even its control over the federal courts themselves*." *Id.* at 752-753 (emphases added). Here, Congress has not required state courts to adjudicate claims, or to apply rules, that would be beyond Congress's authority to impose on federal courts.

the limitations period while the claims are pending in federal court—that interferes with federal interests.

Although the State amici assert (Br. 17) that "no other federal law of which we are aware purports to regulate directly the litigation of purely *State-law* claims in State Court," Congress has from time to time done precisely that. It has exercised that authority under its bankruptcy power, 11 U.S.C. 108(c) (extending limitations periods while bankruptcy automatic stay is in effect plus 30 days), its war powers, see *Stewart*, *supra*; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 525, and its Commerce Clause authority, see *Pierce County*, *supra*.

D. Finally, and contrary to the South Carolina Supreme Court, respondent and its amici suggest that Section 1367(d) is not "necessary" because litigants can avoid limitations periods by filing two lawsuits—one in state court and another in federal court—and seek to stay the former. See Resp. Br. 29; State Amici Br. 14 n.4; Council of State Gov'ts Br. 14 n.2. By requiring plaintiffs seeking a federal forum to secure their state claims by filing two different lawsuits based on the same common nucleus of facts, respondent's proposal would recreate the very sort of wasteful and duplicative litigation and filings that this Court's recognition of pendent jurisdiction and Congress's establishment of supplemental jurisdiction were designed to avoid. See pp. 10-11, *supra*; ALI Study, *supra*, at 453-454. Respondent and its amici, furthermore, offer no guarantee that, where such duplicate lawsuits are filed, stays will be granted. Thus, their proposal would require plaintiffs wishing to exercise their statutory right to a federal forum either to risk their state-law claims to a running limitations period, or to confront the possibility of having to litigate their claims simultaneously in two different courts. *Ibid.* Worse, if the state claims were to go to judgment first, the rule against claims splitting might give the state court judgment preclusive effect in the federal

action, effectively depriving the plaintiff of his statutory right to a federal forum.[8]

Respondent, moreover, nowhere explains how the filing of an additional, duplicate, state-court lawsuit would serve any conceivable purpose not served by the timely filing of the federal action. Respondent does not dispute that, had this suit been filed in state rather than federal court in the first instance, it would have been timely and proceeded on the merits. And that would have been true even if the action had been temporarily dismissed, as occurred here. Under South Carolina law, an amended complaint "relate[s] back to the commencement of the action" and is "not affected by the intervening lapse of time," so long as it does not "set up * * * a wholly different cause of action." *DeLoach* v. *Griggs*, 72 S.E. 2d 647, 649 (S.C. 1952).[9]

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[8] Although respondent asserts (Br. 29) that "there is no South Carolina law prohibiting claim-splitting," respondent appears to misunderstand South Carolina law. Like most jurisdictions, South Carolina appears to follow the rule that "a single cause of action * * * cannot be split up or divided so as to be made the subject of different actions. If this is done and separate actions are brought for different parts of such a demand the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the others." *Lawton* v. *New York Life Ins. Co.*, 186 S.E. 909, 910 (S.C. 1936) (citation omitted). The rule thus "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action unless the party against whom the cause of action exists consents thereto." *Nunnery* v. *Brantley Constr. Co.*, 345 S.E. 2d 740, 743 (S.C. Ct. App. 1986). Although it is possible that federal courts might adopt a rule of federal common law or a construction of 28 U.S.C. 1738 to ameliorate the interference with federal rights that could result, that is not a basis for deeming "unnecessary" a federal statute specifically designed to prevent that injury.

[9] In *DeLoach*, the South Carolina Supreme Court held that the statute of limitations did not preclude the filing of an amended complaint where the original complaint was properly dismissed for failure to plead the location of the accident. Giving the appellant 20 days to amend, the court stated that the "amendment will relate back to the commencement of the action," because it would not require the defendant "to answer a different legal liability from that originally stated in the complaint." 72 S.E.2d at 652. See *Scott* v. *McCain*, 250 S.E. 2d 118, 121 (S.C. 1978) (The "rule stated in *Deloach* v. *Griggs* * * * is applicable" to amended complaint that adds malice allegation in libel suit, because it "does not state a cause of action" that is "new []or different from the cause of action alleged in the original complaint").

Respondent offers no persuasive reason why the State needs to apply a different rule where the suit is filed in federal rather than state court in the first instance. No less than a timely state-court action, a timely lawsuit in federal court serves the purposes of the limitations period, providing prompt notice of the claimed violation and potential liability. See *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (identifying purposes of limitations periods); *Felder* v. *Casey*, 487 U.S. 131, 137 (1988) (purposes of notice-of-claim requirement). To the extent respondent relies on an (unarticulated) state interest in prompt judicial resolution of state-law claims, its (and its amici's) suggestion that state-court suits be stayed pending the federal action, Resp. Br. 29; State Amici Br. 14 n.4; Council of State Gov'ts Br. 14 n.2, would have precisely the same effect on that interest as Section 1367(d). And respondent nowhere asserts that Section 1367(d) interferes with any other objective served by the limitations period. Respondent's claimed interest thus boils down to an asserted right to treat petitioner less favorably—by barring his lawsuit as "affected by the intervening lapse of time"—simply because petitioner originally filed it in federal rather than state court. That is precisely the sort of policy that Congress has authority to redress.[10]

Even if the filing of multiple lawsuits were a marginally acceptable alternative to Section 1367(d), the Necessary and Proper Clause does not embody a least restrictive alternative requirement or limit Congress to enacting only that legislation which is "absolutely or indispensably necessary" to the effectuation of its express powers. *M'Culloch*, 17 U.S.

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[10] Indeed, it is difficult to conceive of a legitimate state interest that may be served by requiring the filing of multiple lawsuits, followed by a stay to prevent the progress of the state action in favor of the federal action.

(4 Wheat.) at 414, 421. Instead, that clause encompasses all legislation that is "convenient, or useful," or "calculated to produce the end." *Ibid.* In any event, the alternative posited by respondent and its amici is clearly inferior. It requires the potentially unnecessary filing of multiple lawsuits, introduces greater uncertainty and cost, and would often prove a trap for the unwary. Here, Congress concluded that Section 1367(d) was the most sensible way of ensuring that plaintiffs seeking a federal forum would not have to risk their state-law claims, while properly regulating the circumstances under which federal courts address such claims. That respondent can identify a less efficacious, more cumbersome (and less equitable) method does not undermine the wisdom of Congress's judgment or its constitutional authority. See *M'Culloch*, 17 U.S. (4 Wheat.) at 415-416, 421.

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For the foregoing reasons and those stated in the opening brief, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted.

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Solicitor General

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